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**BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

In the Matter of:

**LaGuardia Airport: Proposed Extension
of the Lottery Allocation**

Dockets

FAA-2001-9852

41

COMMENTS OF AMERICA WEST AIRLINES, INC.

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August __, 2002

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America West Airlines, Inc. (“America West”) respectfully submits these comments on the Federal Aviation Administration (“FAA”) Notice in the July 8, 2002 Federal Register (67 Fed. Reg. 45,170) announcing a two-year policy extension of the current slot allocation at LaGuardia Airport (“LGA”). First, America West is very concerned that the FAA and the Office of the Secretary have not focused on the need to amend or abolish the Port Authority rule prohibiting flights beyond 1500 miles, the so-called “Perimeter Rule.” Immediate action needs to be taken to abolish or amend the scope of this rule to promote competition. Second, America West believes that the proposed allocation of slots under the lottery should provide substantially

more slots for new entrants and that the parity approach for new entrants and small/non hubs will hinder much needed competition at LGA.

There is No Reason to Postpone Elimination of the Anti-Competitive Perimeter Rule

In February 2001, America West submitted a request to the Department to issue an order abolishing or modifying the LGA perimeter rule to enable America West to operate non-stop service from LGA to its principle hubs of Phoenix and Las Vegas. On April 2, 2001, the Department by Order 2001-4-1 dismissed America West's application without prejudice and suggested that this issue be considered in connection with the FAA review of demand management at LGA. In its "Phase II" comments on the policy alternatives for managing demand at LGA (filed June 20, 2002, in Docket No. FAA 2001-9854), America West presented compelling policy reasons for repealing or amending the Perimeter Rule. These reasons include: that the original purpose of the perimeter rule to promote LGA as a business airport is no longer being served, and that the rule is highly anticompetitive and the operation of larger aircraft on longer haul flights is consistent with and would promote the goal of reducing congestion at LGA. America West also demonstrated that the Department and/or FAA undoubtedly have the legal authority to preempt the rule. This section of America West's Phase II comments is attached for reference.

Unfortunately, in issuing the Notice of Extension, the FAA did not address the perimeter rule. Accordingly, America West wishes to reiterate the urgent need to abolish this rule to the extent necessary to enable new entrants such as America West to serve their principle hub nonstop just as the major incumbent carriers are able to serve their principle East-West hubs. As stated in the previous comments, there is no hope of achieving a fair, rational and efficient air

service system at LGA unless and until the distorting effects of the rule are eliminated. In fact, the rule not only is manifestly anti-competitive, it likely contributes to congestion problems at the airport. While the September 11th attacks have led to a momentary slowdown in growth in air traffic, there is no reason to delay the inevitable and necessary decision to eliminate or modify the Perimeter Rule. First, the rule continues to unfairly distort competition. Second, the decision to eliminate/modify the Perimeter Rule can be made without determining the broader issues regarding demand management at LGA. Third, elimination/amendment of the rule is consistent with the goals and objectives of any demand-management program the Agency may adopt. In short, elimination/amendment of the Perimeter Rule can only help, not hurt the situation at LGA, and there is no reason for FAA to delay using its legal authority to take action.

Proposed Changes to Post-Lottery Allocation Procedures

America West appreciates the acknowledgement that under the lottery system “[b]oth the FAA and the Office of the Secretary recognize that during the next two years, new entrant carrier ability to increase service is significantly disadvantaged in comparison to the flexibility of the large, incumbent carriers that have major slot holdings at [LGA].” 67 Fed. Reg. at 45,172. Although, America West supports the adoption of procedures that will provide new entrants preference in claiming returned or withdrawn slots, the Company respectfully submits the proposed modifications do not go far enough.

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”) was intended to ensure access to LGA from small/non-hubs and by new entrants, not limit it. AIR-21 guarantees new entrants up to 20 slots under 49 U.S.C. 41716(b) (the “New Entrant Mandate”). The establishment of the cap on exemption slots in reaction to large incumbent

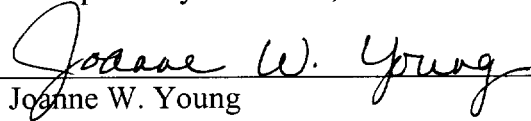
carriers expanding their control over LGA through commuter affiliates increasing service to small/non-hub is patently unfair to new entrants and undermines a key objective of Congress to create opportunities for new carriers to operate at LGA. The decision to guarantee 76 exemption slots for small/non-hub service means there is a ceiling of 83 slots for new entrants. This, FAA maintains is intended to maintain “parity” and “balance” between the two categories. Yet, FAA itself points out large incumbent carriers “still hold approximately 92 percent of the slots at [LGA]” and these slots can be used “for service to [small/non-hub] communities without additional exemption slots.” Id. America West respectfully submits, given the large number of unrestricted slots held by the large incumbents which can be used for any service, including small/non-hub service, FAA should make a larger number of AIR 21 exemption slots available for new entrants. This not only would improve compliance with the New Entrant Mandate without compromising the level of small/non-hub service, but would help mitigate the acknowledged “significant disadvantage” to new entrants vis-à-vis large incumbent carriers. Specifically, any new entrant/limited incumbent should receive all requested slots up to the 20-slot cap, before any additional exemption slots are allocated to small/non-hub service by the large incumbent carriers.

For the foregoing reasons America West requests that the FAA issue an Order permitting America West to operate six daily roundtrips beyond the perimeter to Phoenix and/or Las Vegas

at the carrier's discretion and that 12 exemption slots be made available for this service as contemplated by AIR 21.

Respectfully submitted,

By:

A handwritten signature in cursive script, reading "Joanne W. Young", written over a horizontal line.

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August 7, 2002

EXCERPT FROM COMMENTS OF AMERICA WEST
Filed June 20, 2002, Docket FAA-2001-9854

**ANY DEMAND MANAGEMENT POLICY MUST INCLUDE
A NEW ENTRANT EXCEPTION TO OR ABOLITION
OF THE PORT AUTHORITY'S PERIMETER RULE**

III. ANY DEMAND MANAGEMENT POLICY MUST INCLUDE A NEW ENTRANT EXCEPTION OR ABOLITION OF THE PORT AUTHORITY PERIMETER RULE

Just as a new demand management policy must accommodate the pro-competitive AIR-21 mandates, it is imperative that the new policy either exempt New Entrants from the Perimeter Rule or eliminate the rule entirely. First established as an informal rule in the late 1950s, the Port Authority's Perimeter Rule originally prohibited non-stop flights of more than 2000 miles. When it formalized the rule in 1984, the Port Authority made the rule more stringent, banning flights of more than 1500 miles. The original purposes of the rule, according to the Port Authority, were "to reduce groundside congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul traffic to Newark and Kennedy" airports, and to establish LGA as "an airport catering to business customers" not "leisure travelers."²

² *Western Air Lines v. Port Authority*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987).

All objective studies have concluded that perimeter rules are serious barriers to entry that inhibit competition and lead to higher prices for the traveling public. The Perimeter Rule is an archaic, anti-competitive measure that (if it ever did) achieves none of its purported objectives. Today the rule serves one purpose: the protection of lucrative markets for the dominant air carriers, which can flow traffic through their major hubs within the perimeter.³ Accordingly, any reasonable policy to manage demand at LGA must either create an exemption for New Entrants with their primary hubs outside the perimeter or abolish the Perimeter Rule.

A. The Perimeter Rule is Manifestly Anti-Competitive

The Perimeter Rule virtually ensures the perpetual dominance of the incumbent carriers for LGA service to the West Coast. The General Accounting Office ("GAO") has often expressed its conclusion that the "practical effect" of the Perimeter Rule "has been to limit entry and exacerbate the impact of slots."⁴ The Transportation Research Board echoed this conclusion in its 1999 study of competition in the airline industry:

[perimeter rules] no longer serve their original purpose and have produced too many adverse side effects, including barriers to competition.... The rules arbitrarily prevent some airlines from extending their networks to these airports; they discourage competition among the airports in the region and among the airlines that use these airports; and they are subject to chronic attempts by special interest groups to obtain exemptions.⁵

The Perimeter Rule has a particularly pernicious effect on New Entrants based in the West. In 1996, the GAO concluded the Perimeter Rule "primarily affect[s] airlines that were

³ Denver, which is outside the perimeter, was grandfathered, thus protecting incumbent service to that hub.

⁴ See GAO, *Airline Deregulation: Changes in Airfares, Service Quality and Barriers to Entry* (GAO/RCED-99-92, March 1999), at 20.

⁵ Transportation Research Board, *Special Report 255: Entry and Competition in the U.S. Airline Industry* (1999) (hereinafter "Special Report") at 105.

started after deregulation . . . because the established carriers . . . have their hubs located close enough to LaGuardia . . . that their operations are not limited . . .”⁶ According to the GAO, the Perimeter Rule “limit[s] the ability of airlines based in the West to compete because those airlines are not allowed to serve LaGuardia and National airports from the markets where they are the strongest.”⁷ Meanwhile, the dominant incumbent carriers that operate multiple hubs within the perimeter continue to enjoy the protection from competition that the Perimeter Rule provides.

In America West’s case, it operates two major hubs outside the LGA perimeter: at Phoenix and Las Vegas, 2,100 and 2,200 miles from New York City, respectively. The Perimeter Rule precludes America West from offering one-stop service to the West Coast through its primary hubs. Instead, at LGA, America West is now limited to three daily round trips to Columbus, Ohio (a market it has served for nine years). Customers flying to most West Coast cities on America West must therefore make two connections, one in Columbus, and one in either Phoenix or Las Vegas.⁸ This places America West at a distinct disadvantage to major incumbent carriers, which offer substantial one-stop service between LGA and the West Coast through their major hubs within the LGA perimeter. The GAO has concluded on several occasions that:

⁶ See GAO, *Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Markets* (GAO/RCED-97-4, October 1996) at 2.

⁷ GAO, *Domestic Aviation: Service Problems and Limited Competition Continue in Some Markets* (GAO/T-RCED-98-176, April 1998) at 6; see also GAO, *Domestic Aviation: Barriers to Entry Continue to Limit Benefits of Airline Deregulation* (GAO/T-RCED-97-120, May 13, 1997) at 4; *Airline Deregulation: Barriers to Entry Continue to Limit Competition* (GAO/T-RCED-98-32, October 28, 1997) at 6; *Airline Competition: Barriers to Entry Continue in Some Domestic Markets* (GAO/T-RCED-98-112, March 5, 1998) at 6.

⁸ America West operates a daily roundtrip in the Columbus/Los Angeles market, but America West does not operate a hub at LAX so the flights serve primarily passengers travelling only to or from Los Angeles.

the [perimeter] rules prevent the second largest airline started after deregulation – America West – from serving LaGuardia and Reagan Washington National from its hub in Phoenix and restrict other airlines with hub operations in the West from serving either airport on a nonstop basis.⁹

By contrast, all of the seven largest established carriers are able to serve those airports nonstop from their main hubs because of the hubs' proximity to LaGuardia and National.¹⁰

Indeed, an exception to the Perimeter Rule allows flights to Denver, which is 1,600 miles from New York City¹¹, where United operates another major hub – in effect, permitting United to offer one-stop service to the West Coast through a major hub beyond the LGA perimeter. If the Perimeter Rule were abolished, America West could provide its low fare full service via a single connection to 50 Western destinations through its Phoenix/Las Vegas network which would enhance competition and benefit thousands of passengers. In addition, more than 250,000 annual local Phoenix and Las Vegas passengers would receive non-stop service. In short, the Perimeter Rule effectively excludes low-cost carriers like America West from any significant share of the LGA to the West market.

Consumers are paying unnecessarily high fares to fly from LGA to the West. The GAO confirmed the effect empirically: in 1996, the GAO found fares at LGA were 35 percent higher than those that exist at similar unconstrained airports.¹² In its most recent study, the GAO reported the situation had worsened, finding that airfares at LGA are fifty percent higher on average than fares at other airports serving communities of comparable size.¹³ This is due, in

⁹ GAO/RCED-99-92 at 20.

¹⁰ GAO/RCED-97-4 at 14. *See also*, GAO/T-RCED-97-120 at 4; GAO/T-RCED-98-32 at 6; GAO/T-RCED-98-112 at 6; GAO/T-RCED-98-176 at 6–7.

¹¹ 658 F. Supp. at 953.

¹² GAO/RCED-97-4, Figure 2 at 21.

¹³ GAO/RCED-99-92, Table 4 at 21.

part, to the fact that travelers to the important West Coast market, particularly business travelers, have been denied the savings America West and other New Entrants with Western hubs could provide. Specifically, America West's walk up fares on flights from the Northeast to the Western United States are up to 70 percent below the average fares in those markets and substantially lower than the fares of the largest East-West incumbent carriers.

The Department of Transportation (the "Department") has acknowledged that the Perimeter Rule precludes the establishment of viable routes at LGA and is anti-competitive. On February 1, 2000, America West filed for an exemption with the Department to fly directly from LGA to Phoenix and Las Vegas under 49 U.S.C. § 41714(c). In Order 2001-4-1, the Department agreed that "service between LGA and America West's western hubs would likely be quite successful, and given America West's non-incumbent status, the granting of such exemptions would be pro-competitive."¹⁴ However, the Department denied the request without prejudice and directed America West to pursue this issue in this proceeding. The Department stated specifically, that "FAA is now considering various alternative longer-term approaches to supplant the slot lottery at LGA. These alternatives may be more conducive to permitting America West's arguments to be favorably considered."¹⁵ Accordingly, America West demands that any FAA congestion policy at LGA include either an exemption for New Entrants, or the elimination of the Perimeter Rule.

¹⁴ Order 2001-4-1, *Order* at 5 (April 2, 2001) (footnote omitted). In granting America West exemptions to the Perimeter Rule in effect at Washington Reagan National Airport, the Department concluded the exemptions would allow "the carrier the opportunity to become an effective new competitor between DCA and all beyond perimeter cities it serves via Phoenix and Las Vegas." FAA Order 2000-7-1, *Order Granting Outside-The-Perimeter Slot Exemptions at Ronald Reagan Washington National Airport* at 21 (July 5, 2000). Similarly, lifting the Perimeter Rule or providing an exception for new entrants would certainly allow America West to inject similar competitiveness into the LGA market.

¹⁵ *Id.*

B. The Perimeter Rule Serves No Reasonable Policy Goal and May In Fact Contribute to Congestion at LGA

Since the Perimeter Rule was formally adopted in 1984, the industry and air travel have experienced unprecedented growth and undergone radical change. At that time, the only carriers operating LGA-West service were the large incumbents with which the Port Authority consulted before imposing the restriction. In the ensuing 18 years, changes in levels of service, development of expansive hub and spoke networks, the lack of gates and facilities at Newark and increasing industry consolidation have completely changed the competitive dynamic and the role of LGA in the national air transportation system. Even if the Perimeter Rule once served the policy objectives the Port Authority claims it serves, today it clearly does not.

As an initial matter, it is obvious the Perimeter Rule is no longer needed to nurture other airports in the New York area, specifically John F. Kennedy International Airport ("JFK"). In addition, with the successful development of JFK (and Newark) over the last 20 years, including the initiation of service by JetBlue at JFK to many short haul markets, there is no longer any basis for maintaining a short-haul/long-haul distinction between the airports. Indeed, it is an utter fallacy to claim that the Perimeter Rule prevents LGA from serving "long-haul" markets – instead, it merely determines (and distorts) how those markets are served. Rather than allowing direct service to beyond-perimeter cities, the Perimeter Rule requires all these cities regardless of size to be served via within-perimeter hubs. In fact, the Perimeter Rule now only serves to protect incumbents from competition both at LGA and other airports and impedes the development of a natural distribution of aircraft operations among the vibrant New York area airports.

Significant changes in the airline industry in the last twenty years have also rendered the Perimeter Rule an ineffective means of ensuring the Airport caters to business travelers and limits leisure travelers. To the extent it ever had any validity, the idea that the Perimeter Rule ensures LGA remains a “business” airport is simply an anachronistic relic of an age long since past. First, business links between Phoenix (America West’s primary hub in the West), other Western destinations and New York City have experienced huge growth in the past twenty years. A substantial amount of travel between the West and New York is by time sensitive business travelers.

Second, there is no validity to the claim that the Perimeter Rule discourages “leisure” travelers from using LGA. To the contrary, even a brief review of operational data shows that LGA is flooded with daily departures to leisure markets, including Bermuda, the Bahamas and several vacation destinations in Florida. In April of 2001, for example, there were approximately sixteen daily departures to Fort Lauderdale, fifteen to Orlando, ten to Miami and nine each to West Palm Beach and Tampa. Together, service to Bermuda, the Bahamas and Florida destinations alone accounted for approximately 140 round trips from LGA or 11.7% of the 1200 scheduled operations allowed under the FAA’s limitation established January 31, 2001. This means that departures to or arrivals from these predominantly leisure destinations accounted for approximately one of every nine operations at LGA – and this is only a portion of the leisure market served. Even following post-September 11th schedule reductions, departures to these leisure destinations today continue to represent a significant portion of total departures. In April of this year, there were approximately twelve departures to Fort Lauderdale, nine to Orlando,

seven to Miami, six to West Palm Beach, and seven to Tampa. Service to Bermuda, the Bahamas and Florida account for approximately 8.3 percent of departures.

The Department itself has manifestly abandoned any pretext that the Perimeter Rule operates to limit leisure travel at LGA. In fact, it routinely approves applications for exemptions expressly intended to serve and expand service to leisure markets through LGA. For example, the Department just last June approved U.S. Airways' application for an exemption to inaugurate nonstop services between LGA and Freeport, Bahamas.¹⁶ In its application, US Airways explicitly argued the service would "support[] the development and flow of tourism and commerce between the Bahamas and the many communities served by US Airways at . . . LaGuardia."¹⁷ The airline also explicitly argued the new service would provide access to the tourist destination "to dozens of communities beyond the immediate . . . New York City metropolitan area[]." ¹⁸ In other words, the service would draw leisure travelers to LGA from the airline's network for purposes of taking them to this final tourist destination. The Department also approved US Airways' application for an exemption for LGA-Nassau, Bahamas service based on substantially identical grounds the previous year¹⁹ and very recently granted the airline's application for a two-year renewal of this exemption.²⁰

¹⁶ *Notice of Action Taken*, Docket OST-01-9766-2 (June 18, 2001).

¹⁷ *Application of US Airways, Inc. for an Exemption (Charlotte/New York-Freeport, Bahamas)*, Docket OST-01-9766-1 at 2 (May 25, 2001) (emphasis added).

¹⁸ *Id.*

¹⁹ *Application of US Airways, Inc. for an Exemption (LaGuardia-Nassau, Bahamas)*, Docket OST-00-7339 (May 5, 2000) and *Notice of Action Taken*, Docket OST 2000-7339 (May 30, 2000).

²⁰ *Application of US Airways, Inc. for Renewal of Exemption (LaGuardia-Nassau, Bahamas)*, Docket OST-00-7339 (March 27, 2002) and *Notice of Action Taken*, Docket OST-2000-7339 (April 15, 2002).

Similarly, in 1998, the Department granted Spirit Airlines, Inc. ("Spirit"), four slot exemptions for nonstop service between Melbourne, Florida and LGA²¹ and two slot exemptions for nonstop service to Myrtle Beach, South Carolina.²² In its Melbourne Application, Spirit argued, *inter alia*:

- LGA "is conveniently located for both business and leisure travelers"²³;
- "The Melbourne area is perhaps best known for its beaches and major tourist attractions – i.e., the Kennedy Space Center and Port Canaveral, the third largest cruise ship port in North America";²⁴ and
- "Although Melbourne generally is identified as a leisure market, Spirit expects that its traffic will be split between leisure travelers and business traffic".²⁵

In its Myrtle Beach Application, Spirit pointed out that "[a]n estimated 65-70% of all employment in Horry County, where Myrtle Beach is located, is tourism-related. Myrtle Beach simply must have access to convenient and affordable air transportation in order to remain a magnet for convention and leisure traffic."²⁶ Horry County pointed out that "[b]y approving Spirit's application, the Department would merely continue a course of action it has previously endorsed - authorizing a carrier to provide Myrtle Beach – New York service. This service is of critical importance to the tourism-dependent economy of Myrtle Beach."²⁷ In sum, Spirit's

²¹ DOT Order 98-4-22, *Order Granting and Denying Applications for Slot Exemptions at New York's LaGuardia and John F. Kennedy International Airports* (April 21, 1998); *Application of Spirit Airlines, Inc. for an Exemption*, OST-97-2870 (August 29, 1997) (hereinafter "Melbourne Application").

²² DOT Order 98-10-29, *Order Granting and Denying Applications for Slot Exemptions at New York's LaGuardia Airport* (October 27, 1998); *Application of Spirit Airlines, Inc. for an Exemption*, Docket No. OST-97-2932 (September 24, 1997) (hereinafter "Myrtle Beach Application").

²³ *Melbourne Application* at 2.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Myrtle Beach Application* at 4-5 (emphasis original, footnote omitted).

²⁷ *Answer of Horry County and its Department of Airports*, Docket No. OST-97-2932 (October 7, 1997) at 2. The County also argued that "[g]iven that the Myrtle Beach area accounts for one-third of South Carolina's total revenue from travel and tourism", denial of the application "would have significant impact on tourism related air travel for Horry County and the State." *Id.* at 3. Spirit echoed this argument in a later pleading: "If there is any doubt that 'exceptional circumstances' warrant approval here, Spirit would like to re-emphasize the fact that the economy of

(continue)

Myrtle Beach Application was based almost exclusively on the need to provide service to leisure travelers at LGA – an argument the Department accepted in granting the requested exemptions.

In fact, the Department's actions in recent years have illustrated New York's aviation market has evolved to a point where it is undesirable to maintain any leisure/business service distinction among the areas airports. For example, in 2000 the Department considered the application of TWA to provide nonstop service between LGA and Bermuda, in which the airline emphasized "American and Continental provide Bermuda service from JFK and Newark, respectively, but TWA's service will complete the pattern of service from New York airports."²⁸ In approving the application²⁹, the Department implicitly acknowledged that it is desirable for LGA to provide service to leisure destinations even where service to the same destinations already exists via New York's other airports. The Department has even apparently concluded that it is sometimes better to provide service to leisure travelers via LGA rather than New York's other airports. In support of its Myrtle Beach Application, Spirit argued that "service from LGA would offer greater public benefits than would service from JFK. LaGuardia is far more centrally located than JFK, offering convenient access to Myrtle Beach from Connecticut, Westchester, and New Jersey."³⁰ In approving the application, the Department implicitly endorsed the view that in some circumstances providing service to leisure travelers at LGA is to be preferred to providing the same service via New York's other airports. Clearly, to the extent

(continued)

Horry County is highly dependent upon tourism. . . . Without access to key markets such as New York, the economy of this area will stagnate, and Myrtle Beach will lose tourists to competing destinations which enjoy adequate nonstop air transport service." *Reply of Spirit Airlines, Inc.*, Docket No. OST-97-2932 (October 20, 1997) at 4.

²⁸ *Exemption Application of Trans World Airways, Inc.*, Docket OST-00-2000-6799 (Jan. 18, 2000) at 2.

²⁹ *Notice of Action Taken*, Docket OST-2000-6799 (Feb. 3, 2000).

³⁰ *Reply of Spirit Airlines, Inc.*, Docket No. OST-97-2932 (October 20, 1997) at 3.

the Perimeter Rule is intended to limit congestion at LGA by diverting leisure travelers to other airports, it is a wholesale failure and the Department has, through its actions, acknowledged the fact.

Finally, the Perimeter Rule likely contributes to the congestion problem at LGA. First, lifting the Perimeter Rule would allow direct service for travelers to Western markets, likely reducing the number of operations to other hubs from LGA necessary to serve them. Instead of legions of smaller planes full of travelers departing to regional hubs to make connections to Western destinations, a smaller number of larger planes could take business travelers directly to their Western destinations. Furthermore, increasing competition for one-stop service to West Coast markets (by allowing beyond-perimeter service to Western hubs) will introduce new efficiencies in the LGA-West Coast market, likely leading carriers to use larger aircraft with better load factors to serve this important market. In other words, maintaining the Perimeter Rule more likely increases congestion at LGA, completely undermining the primary policy objective it is supposed to serve and the objective of the present Notice under consideration.³¹

C. If Left in Place, the Perimeter Rule Will Prevent the Achievement of Goals and Objectives of Any New LGA Demand Management Policy

Whether market-based or administrative, the goals and objectives of any new demand management policy at LGA cannot be adequately achieved absent repeal or amendment of the

³¹ In addition, there is no justification for retaining the Perimeter Rule as a measure to control aircraft noise and protect the environment. The Perimeter Rule does not serve to limit the number of operations at LGA, it only (without substantial justification) ensures that the full capacity of LGA's airfield will be devoted to operations to/from points within the perimeter. There is no evidence that flights to/from destinations beyond the perimeter are any noisier than flights to points within the perimeter. Indeed, lifting the Perimeter Rule may actually decrease noise at airports that currently impose such restrictions. See *Lifting Perimeter Rule at National Airport May Decrease Aircraft Noise*, Press Release from the Office of Senator John McCain (Dec. 16, 1997) (identifying a Boeing study concluding "that lifting the perimeter rule at National Airport may decrease noise, since carriers often use aircraft that have better range and fuel efficiency for longer routes").

Perimeter Rule to allow New Entrant access. In this regard, America West welcomes the Port Authority's and FAA's emphasis on the need to allocate the use of the LGA airfield as efficiently as possible. However, the Port Authority and the FAA must acknowledge that as long as the Perimeter Rule continues to restrict access to the LGA market, an economically efficient allocation of service at LGA is an impossibility. Indeed, absent exemptions from or abolition of the Perimeter Rule, any effort to increase efficiency at LGA can only result in reinforcing the market inefficiencies and anti-competitive effects identified above.

Similarly, the Perimeter Rule will (if retained) frustrate the operation of any of the administrative proposals identified in the Notice. For example, encouraging the use of larger aircraft at LGA through an administrative rule while simultaneously retaining the Perimeter Rule will only serve to exacerbate the anti-competitive effects of the Perimeter Rule. Absent the elimination or amendment of the Perimeter Rule, an administrative measure that encourages the use of larger planes will likely consolidate further the dominant position of incumbent carriers. This is because the most intense competition for service by large airplanes with heavy load factors potentially comes from service to hub markets, many of which are artificially excluded from service through LGA by the Perimeter Rule. Adopting an administrative measure to encourage the use of larger aircraft without repealing the Perimeter Rule will benefit carriers with hub operations within the perimeter and only serve to augment and reinforce their dominance at LGA.

Similarly, the Perimeter Rule will limit the effectiveness of any measure designed to encourage new entry into the LGA market. The Perimeter Rule, by limiting service to points within 1500 miles seriously inhibits the market choices of New Entrants and makes it more

difficult for these carriers to compete against the incumbent carriers, thus frustrating the policy objective of the administrative measure.

In sum, a demand management program that fails to include the abolition or amendment of the Perimeter Rule will only succeed in doing what the current slot system has succeeded in doing: institutionalizing the protection of market share for dominant carriers at the expense of robust competition and lower fares for consumers.

D. The FAA Has the Authority to Preempt the Perimeter Rule

The Port Authority, of course, has the power to revoke its Perimeter Rule, or create exceptions to it. However, if the Port Authority refuses to act, it is equally clear that the Department or FAA can preempt the rule, either in whole or in part.

The Port Authority has as much as acknowledged that the Department has authority to preempt its rule. When America West applied in February 2001 to the Department for an exemption to permit it to operate non-stop service between LGA and its two main hubs at Phoenix and Las Vegas, it established that the Department has the authority to preempt the Perimeter Rule.³² In its opposition to America West's application, the Port Authority pleaded that the Department "should not" preempt the Perimeter Rule and asked it not to do so because, it asserted, the rule is a "valid exercise" of its proprietary rights.³³ It failed to present one argument that the Department could not preempt the Perimeter Rule. It did not refute the Department's authority because it cannot.³⁴

³² *Application of America West Airlines for and Exemption*, OST-2000-7176-45, OST-2001-8844 (Feb. 1, 2001) at 6-10.

³³ *Answer of the Port Authority of New York and New Jersey in Opposition to Application for Exemption*, OST-2000-7176-47 (Feb. 15, 2001) at 1-14.

³⁴ The Department did not decide the issue in this proceeding. DOT Order 2001-4-1, *Order* (April 2, 2001) at 5 n.5.

Under the Supremacy Clause of the United States Constitution, federal law preempts the inherent powers of the states when the federal government makes clear its intent that federal law is to have such effect.³⁵ It is axiomatic that federal agencies acting within their statutory powers have the power to preempt state and local laws. “Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”³⁶ To act preemptively, the agency need not depend on an “express authorization to displace state law”³⁷ Whether an agency action has preemptive effect depends on whether the agency intended to preempt the state law and whether the agency has exceeded its authority.³⁸

The FAA or the Department clearly has the authority to preempt the Perimeter Rule. Congress has granted the Department and the FAA pervasive authority to regulate air transport and air space and explicitly manifested its intent to give the Department preemptive authority over local restrictions on rates, routes and services in Section 105 of the Airline Deregulation Act.³⁹ In *American Airlines, Inc. v. DOT*, 202 F.3d 788, 800 (5th Cir. 2000), the Fifth Circuit concluded that in the area of aviation regulation, “federal concerns are preeminent” and “DOT is charged with representing those concerns.” Accordingly, promulgation of a regulation that

³⁵ U.S. Const. art. VI, cl. 2; *National Fuel Gas Supply v. Public Service Com’n*, 894 F.2d 571,575 (2^d Cir.), *cert. denied*, 497 U.S. 1004 (1990).

³⁶ *United Transp. Union v. Foster*, 205 F. 3d 851, 859 (5th Cir. 2000) (quoting *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986). See also *Fidelity Federal Savings & Loan Association v. De Lacuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes”); *New York v. FCC*, 486 U.S. 57, 64 (1988) (“The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (DOT interpretation of federal motor vehicle safety standard conflicting with state tort law preempted state law despite lack of formal statement of preemptive intent for safety standard or use of notice and comment rulemaking proceeding before issuing the interpretation).

³⁷ 458 U.S. at 154 (citation omitted).

³⁸ *Id.*

³⁹ 49 U.S.C. § 41713.

preempts the Perimeter Rule to meet the overriding public interests of promoting new entry and competition clearly is within the DOT's and FAA's authority.

Indeed, even when the U.S. District Court upheld the Perimeter Rule in *Western Air Lines*, it expressly conditioned the validity of the rule on the absence of any conflicting FAA regulations. After noting the Second Circuit's controlling determination that "airport proprietors have an 'extremely limited role' in the system of aviation regulation,"⁴⁰ the court held: "[t]his court concludes that, in the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion . . . fits comfortably within that limited role, which Congress has reserved to the local proprietor."⁴¹ Thus, the FAA has always had and retains the authority to displace the Perimeter Rule. Consequently, even if the rule could still be upheld as a legitimate exercise of the Port Authority's proprietary authority,⁴² the FAA retains the power to displace it.

The court's holding in *Western Air Lines* was based on careful construction of Sections 105(a)(1) and (b)(1) of the Airline Deregulation Act of 1978 ("ADA"). Now codified as 49 U.S.C. § 41713(b)(1), Section 105(a)(1) prohibits airport proprietors from enacting or enforcing any measure "related to prices, route or service of an air carrier". However, Section 105(b)(1), now codified as 49 U.S.C. § 41713(b)(3), provides that the preemption provision does not limit an airport proprietor "from carrying out its proprietary powers." In upholding the Perimeter Rule, the court thus concluded that its promulgation was within the scope of proprietary powers

⁴⁰ 658 F. Supp. at 956 (quoting *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1010 (2d Cir. 1977)).

⁴¹ 658 F. Supp. at 957 (emphasis added).

⁴² In a subsequent decision, the Second Circuit arguably limited the scope of a proprietor's power under Section 41713, holding that proprietors "may regulate only a narrowly defined subject matter – aircraft noise and other environmental concerns at the local level." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2^d Cir. 1998).

preserved under Section 105(b)(1). The court did not conclude, however, that the Port Authority's power to enact the Perimeter Rule was unqualified. Rather, as noted above, the Port Authority's power was subject to the superseding authority of the Department of Transportation to modify or displace the rule altogether by regulation. This is consistent with the court's holding in *Aircraft Owners and Pilots Association v. Port Authority*,⁴³ a pre-ADA case upholding the Port Authority's power to impose take-off fees in an effort to manage congestion at LGA, JFK and Newark. In that case, the court was careful to note that in this context "[d]irect conflict between federal regulation and local law of course results in the invalidation of the local provision" and held that "there is room for the operation of Port Authority Regulations which have the effect of curtailing activities not forbidden by federal regulation."⁴⁴ As delineated in *AOPA v. Port Authority*, any proprietary power to manage airport congestion through rules that affect the movement of aircraft that existed before enactment of the ADA was a power conditioned on the absence of any conflicting FAA regulations. Thus, *Western Air Lines* was clearly correct in holding that the proprietary power preserved under the ADA is similarly conditioned.⁴⁵

The Fifth Circuit's holding in *City of Houston v. FAA*⁴⁶, is also dispositive. There the court considered the validity of the perimeter rule imposed at DCA, where the FAA was (at that time) the proprietor of the airport. In upholding the rule, the Fifth Circuit concluded that the

⁴³ 305 F. Supp. 93 (E.D.N.Y. 1969).

⁴⁴ 305 F. Supp. at 104-05 (E.D.N.Y. 1969) (emphasis added).

⁴⁵ The ADA certainly did not enlarge the powers of proprietors. See *Southwest Airlines Automatic Market Entry*, 83 CAB 644, 651-52 (1979) ("Section 105(b)(1) was not intended to give airport operators additional proprietary rights"). The Board's decision that Dallas/Fort Worth Airport could not "veto" the Board's approval of Southwest Airlines' application to provide service between Love Field and New Orleans, further supports the view that both before and after enactment of the ADA, the power of airport proprietors to regulate the flight of aircraft is subject to the superseding authority of competent federal agencies.

FAA's power to impose the rule derived from two "independent" sources – its status as proprietor and the authority conferred upon it under the FAA Act.⁴⁷ After reviewing the litany of provisions in the FAA Act granting the FAA its pervasive authority to regulate aviation, the court concluded:

The terms of the Act clothe the FAA with authority to formulate policy for the efficient use of navigable airspace and landing areas. . . . To promote its "efficient utilization", the FAA must have the power to make rules and regulations governing not only the corridors of air traffic, but the use of airports as well.⁴⁸

Clearly, the FAA's authority to impose a perimeter rule in exercising its exclusive authority to regulate the use of airspace and airports also includes the power to eliminate such rules when necessary.

Moreover, in AIR-21, Congress made clear its intent that management of air traffic at LGA must ensure competition by New Entrants.⁴⁹ Under the Supremacy Clause, preemption need not be express. Rather, Congress will be deemed to have displaced a state and local law that actually conflicts with federal law: "[s]uch a conflict arises when state law 'stands as an obstacle to the accomplishment of the full purpose and objectives of Congress.'"⁵⁰ Because, as demonstrated above, every objective observer has found the Perimeter Rule inhibits competition and stands as a serious barrier to entry, it manifestly "stands as an obstacle" to achieving important, Congressionally-mandated goals. Clearly, the FAA is well within its statutory authority to preempt the Perimeter Rule.

(continued)

⁴⁶ 679 F.2d 1184, 1193-96 (5th Cir. 1982).

⁴⁷ 679 F.2d 1193.

⁴⁸ 679 F.2d at 1196 (emphasis added).

⁴⁹ 49 U.S.C. § 41716(b).

⁵⁰ 458 U.S. at 153 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Department or FAA also have the authority to overturn the Perimeter Rule on grounds it is not a reasonable exercise of the Port Authority's proprietary powers. In *American Airlines*, the Fifth Circuit affirmed the Department's finding that local restrictions on interstate service from Love Field intended to allocate short haul traffic to a particular airport related to routes within the meaning of the preemption clause of the Airline Deregulation Act and were outside the scope of the proprietary powers exception.⁵¹ Similarly, in its *Love Field Service Interpretation Proceeding* decision, which the Fifth Circuit affirmed in *American Airlines*, the Department stated, "[w]hile an airport owner may impose limits on certain types of service operated at an airport, those limits must be reasonable, non-discriminatory, and necessary to carry out a legitimate goal, such as limiting noise or congestion."⁵² These decisions clearly support the right of the Department or the FAA to review the current justification (if any) for the Perimeter Rule.⁵³ Indeed, even in *Western Airlines* the court recognized the Department could create exceptions to the rule.⁵⁴ Given that, as demonstrated conclusively above, the Perimeter Rule serves no reasonable policy goal and actually works contrary to the very end it is supposed to serve by contributing to congestion, the FAA is clearly within its powers to displace the rule.

⁵¹ *Id.* at 804-806. In reaching this conclusion, the *American Airlines* court cited *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2d Cir. 1998), in which the Second Circuit, struck down a local restriction on helicopter sightseeing routes on the grounds "that 'Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted.'" See *American Airlines*, 202 F.3d at 807 (citing *National Helicopter*, 137 F.3d at 92, n.14).

⁵² DOT Order 98-12-27, *Declaratory Order*, Docket OST-98-4363 (Dec. 23, 1998) at 45.

⁵³ *Cf. New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989). Here, rejecting argument that landing fee "is not within the area of regulation by the DOT, as per the § 105(b) proprietary exception," the court concluded that "[e]ven though there is no direct regulation of rate setting by the DOT, determination of what is a 'reasonable' or 'non-discriminatory' landing fee is . . . subject to DOT's exclusive jurisdiction." 883 F.2d at 173.

⁵⁴ 658 F. Supp. 952, 960, n.13.